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NOTARIAL ACTS AS WRITTEN EVIDENCE: TOWARDS A CONVERGENCE BETWEEN CIVIL LAW AND COMMON LAW SYSTEMS

Angelo Chianale*

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ABSTRACT

This article studies the contrast between civil and common law systems regarding the significance of the notarial act. According to conventional scholarship, in the former, civil procedure requires written evidence and the notarial act is the strongest kind of evidence. In the latter, however, civil procedure requires oral evidence and the notarial act has no specific relevance. This article examines the extent of these two main principles: a) in civil law systems the notarial act is full evidence of the extrinsic and a document can be challenged only with an action for falsity; and b) in common law

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systems the notarial act has no specific evidentiary effect. Examination of the operational rules of both systems shows a marked weakening of the traditional theoretical opposition due to an increasingly pragmatic approach in solving problems linked to notarial acts, which are nowadays the same everywhere. This change marks an inexorable abandon of the crystallization of the classical schemes and theories, which, over the past centuries, have considered common law solutions a separate world from the civil law legal tradition.

Keywords: notarial act, public document, act under seal, deed, *vestimentum*, *ius commune*, *contrelettres*, *témoins passent lettres*, extrinsic, intrinsic

I. INTRODUCTION

Some of the strongest and most common oppositions in comparative law are centered on the notarial act. The notary is a public official in civil law systems who produces public or authentic documents with a high evidentiary value in the civil process, where written proof prevails.¹ In contrast, common law systems have neither this type of notary, nor these public documents, and the proof provided in courts is predominately oral.

Often, the easiest and most successful oppositions, clear and linear in their approach, do not correspond with the facts. In the English system, there have been two new events, over the last few decades, that have modified the usual representation of these arguments.

First, judges of European common law systems are now called to accept any authentic document (notarial acts and court decisions) that originates from another European Union member state.² In the English system, the relevant rules can be found in parts 74A and

1. For relevant comparative law literature, see L. N. Brown, *The Office of the Notary in France*, 2 INT'L COMP. L. Q. 60 (1953); D. B. Burke, Jr. & J. K. Fox, *The Notaire in North America: A Short Study of the Adaptation of a Civil Law Institution*, 50 TUL. L. REV. 318 (1976).

2. See Brussels Convention of May 25, 1987; Lugano Convention of September 16, 1988.

74B of the Civil Procedure Rules (CPR). Second, English judges have the capacity to receive a notarial act “in evidence without further proof.”³

It is thus an opportune time to revisit the nature of the notarial act in the civil law systems and its peculiar strength as proof, comparing it with its counterpart under common law. This approach requires us to ascertain the typical evidentiary value of the notarial act among the various types of written evidence admitted in the civil procedure.⁴

II. NOTARIAL ACTS AND DEEDS: AN HISTORICAL OVERVIEW

In Romano-Germanic civil procedure, written proof is found primarily in public documents and private agreements. The public document is characterised by the intervention of a public official such as a notary during drafting.

Pothier’s definition of a public document is still used: “Authentic acts are those which are received by a public officer, with the requisite solemnities.”⁵ This definition appears in article 1317 of the French Civil Code: “An authentic act is one that has been received by public legal officers who have the authority to draw up such acts at the place where the act was written and with the requisite formalities.”⁶

Through the French Civil Code, Pothier’s definition reached Belgium (article 1317 of the Code Civil, identical to the French),

3. Civil Procedure Rules 2005, 32.20 (CPR 2005).

4. For a general overview of the written evidence in civil procedure, see DIMENSIONS OF EVIDENCE IN EUROPEAN CIVIL PROCEDURE (V. Rijavec, T. Ivanc & T. Kerestes eds., Wolters Kluwer 2016).

5. R. J. POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS, OR CONTRACTS 516 (W. D. Evans trans. 1853) [hereinafter OBLIGATIONS OR CONTRACTS]; R. J. Pothier, *Traité des obligations*, in OEUVRES DE POTHIER 367 (J.-J. Bugnet ed., Videcoq père et fils 1846): “*Les actes authentiques sont ceux qui sont reçus par un Officier public, avec les solemnités requises.*” [hereinafter *Traité des obligations*].

6. The relevant French text (and English translation) can be found on the Legifrance website: “*L’acte authentique est celui qui a été reçu par officiers publics ayant le droit d’instrumenter dans le lieu où l’acte a été rédigé, et avec les solemnités requises.*” <https://perma.cc/FLA4-U6GT>.

Québec (article 2813 of the Civil Code of Quebec: “An authentic act is one that has been received or attested by a competent public officer in accordance with the laws of Québec or of Canada, with the formalities required by law.”), Italy (article 1315 and article 2699 of the *Codice civile* from 1865), and Louisiana (article 2234 of the Louisiana Civil Code of 1870⁷: “The authentic act, as relates to contracts, is that which has been executed before a notary public or other officer authorised to execute such functions . . .”).

The German Code of Civil Procedure (*Zivilprozeßordnung* or ZPO) is similar. Under §415, public documents (*öffentlicher Urkunden*) are defined as: “Documents that have been prepared, in accordance with the requirements as to form, by a public authority within the scope of its official responsibilities, or by a person vested with public trust within the sphere of business assigned to him.”

A document similar to the *acte notarié* of continental systems also exists in English law. In England, legislation regarding public notaries indeed cites “notarial acts,”⁸ but it does not define them, specifying only that the tasks of public notaries, among others, are to “perform or certify any notarial act.”⁹ A famous scholar defined the notarial act as “any written instrument, act, or ceremony, under the signature and seal of a notary, authenticating or certifying some document, deed, writing, occurrence or fact.”¹⁰

However, the most solemn document in the English system, substantively equivalent to the continental public document, is not the *notarial act*, but rather, the simple *act under seal* (deed). The deed, until a few years ago, was defined as a solemn document, written,

7. Repealed by Acts 1984, No. 331, §1, eff. Jan. 1, 1985, replaced by art. 1833.

8. The historical layering of works from English notaries appears in the definition contained in the Legal Services Act 2007, schedule 2: “‘Notarial activities’ means activities which . . . were customarily carried on by virtue of enrolment as a notary in accordance with section 1 of the Public Notaries Act 1801 (c. 79).”

9. Public Notaries Act 1833, s. 3-4.

10. R. BROOKE, A TREATISE OF THE OFFICE AND PRACTICE OF A NOTARY OF ENGLAND 190 (Saunders & Benning 1839). On “notarial seal, which gives effect to them” is affixed, *see* King v. Scriveners’ Co. 1830 10 B. & C. 511; 109 E.R. 540, 544.

sealed, and delivered by the author.¹¹ The requirement of the seal had been long substituted with a circular mark, pre-printed on the sheet, containing the letters L.S. (*locus sigilli*).¹² The Law of Property Act definitively abolished this requirement.¹³ On the other hand, this law provided that it must be “clear on its face that it is intended to be a deed,”¹⁴ that the deed must be undersigned in the presence of a witness,¹⁵ and that it must be delivered by the author or the professional who oversaw its preparation.¹⁶

The formality of the deed constitutes the most solemn form of documentation known under the English legal system. Indeed, it is not only necessary for the transfer of legal estates on land, but also for the assumption of obligations without consideration.¹⁷ The function of *vestimentum* for the transfer of a right or the assumption of an obligation without consideration is carried out in a deed. Put differently, the presence of a consideration or the formality of the deed are the legal requirements necessary in common law to justify the transfer of a right or the enforceability of a promise: if a consideration is lacking, the deed supports the transfer or the promise. It has the same effect as a continental notarial act. In common law systems, a notarial act, which does not require the conditions imposed by a deed, cannot transfer a legal estate, nor can it compensate for the absence of consideration.

It is thus misleading to compare, at the level of substantive law, the public document of the Romano-Germanic systems with the English notarial act. For this reason, international private law scholars usually equate the continental public document with the deed in

11. See R. MEGARRY & H.W.R. WADE, *THE LAW OF REAL PROPERTY* 156 *et seq.* (5th ed., Sweet & Maxwell 1989); G.C. CHESHIRE & E.H. BURN, *MODERN LAW OF REAL PROPERTY* 734 *et seq.* (14th ed., Oxford U. Press 1988).

12. This practice was already accepted in *First National Securities Ltd v. Jones* [1978] Ch. 109.

13. Law of Property Act, 1989, s. 1(1)(c).

14. *Id.* s. 1(2)(s).

15. *Id.* s. 1(3)(a).

16. *Id.* s. 1(3)(b) and 1(5).

17. See H. DE PAGE, *L'OBLIGATION ABSTRAITE EN DROIT INTERNE ET COMPARÉ* 137 *et seq.* (Bruylant 1957).

common law countries. When the law in a continental system imposes the solemn form of the public document, such a request is satisfied if the document, created in the common law system, has been executed as a deed.¹⁸

III. THE DOCUMENTARY PROOF IN THE CIVIL PROCEDURE: A COMPARATIVE EXCURSUS

In the systems under review, a wealth of comments have been made on the evidentiary value of the written document and, in particular, the notarial act. In common law systems, a general principle exists which vests the judge (at times flanked by a jury) with freedom of verdict in the evaluation of the evidentiary material presented during the trial.

In Romano-Germanic systems, however, written documents prevail in civil procedure: the main method of proof is the written document. Written proof is said to be civilized, and testimonial proof to be barbarian.¹⁹ The types of written evidence are varied, but the most important are public documents, which allow “legal certainty” to be determined. Indeed, in the realm of written procedure, the presentation of a notarial act in court deprives the judge of his power to evaluate the proof. Judges cannot evaluate the document: they may only look at the result of the evidence and deduce the effect as established by the law.²⁰

18. See Ph. Francescakis, *Commentaire d'arrêt n°121/1951*, REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 372 (1953); G. KEGEL, INTERNATIONALES PRIVATRECHT 369 (5th ed., Beck 1985).

19. M.L. LAROMBIÈRE, 5 THÉORIE ET PRATIQUE DES OBLIGATIONS 472 (1885): “la preuve littérale appartient à la civilisation, et la preuve testimoniale à la barbarie.”

20. For an interesting historical and comparative analysis, see M. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS (Yale U. Press 1986). A comparative approach to the rules on evidence is developed in CIVIL LITIGATION IN COMPARATIVE CONTEXT 9 (O. G. Chase & H. Hershkoff eds., West 2007). On the origins of the Roman-Germanic rules on evidence, see also the fundamental study of K.W. NORR, ROMANISCH-KANONISCHES PROZESSRECHT ERKENNTNISVERFAHREN ERSTER INSTANZ IN CIVILIBUS (Springer 2012); see also J. Sladic & A. Uzelac, *Assessment of Evidence*, in DIMENSIONS OF EVIDENCE IN EUROPEAN CIVIL PROCEDURE, *supra* note 4, at 108 *et seq.*

In Germany, the notion of full proof can be found in § 415, 1 of the ZPO: public acts “shall establish full proof, provided they have been executed regarding a declaration made before the public authority or the public official issuing the deed.” They are assisted by the “presumption of truth”²¹ (*Vermutung der Echtheit*). The same rule is repeated in § 417 and § 418 of the ZPO respectively, relative to documents derived from public administration. The fact that the document is written and signed by a notary is by itself sufficient to grant to the act full evidence, in particular regarding these elements: the place and date of their creation, the identity of notary and parties, and the actions made by the parties and by the notary (this is called the extrinsic).²² However, the full evidence given by notarial acts must be interpreted narrowly because it is an exception to the judge’s power to evaluate the evidence received during the trial.²³ A clear example of this rule can be found in a case decided by the German Supreme Court in 2016²⁴: a house was sold; the notarial act stated its area amounted to 640 square meters; the buyer later measured the area and found it was only 540 square meters. The court explained that the full evidence was given to the fact that the seller

21. § 437 ZPO.

22. See H.J. Ahrens, *sub* § 415 ZPO, in B. WIECZOREK & R. SCHÜTZE, *ZIVILPROZESSORDNUNG UND NEBENGESETZE* 636 *et seq.* (3d ed., Beck 2010), and therein a comprehensive list of documents, which fall under the application of the cited paragraphs; C. Berger, *sub* § 415 ZPO, in F. STEIN & M. JONAS, *KOMMENTAR ZUR ZIVILPROZESSORDNUNG* 770 *et seq.* (23d ed., Mohr Siebeck 2015); L. ROSENBERG, K.H. SCHWABT & P. GOTTWALD, *ZIVILPROZESSRECHT* 673 (17th ed., Beck 2010). *Entscheidungen des Reichsgerichts in Zivilsachen* [RGZ] [Decisions of the Reichsgericht in civil matters] (RGZ) Dec. 16, 1910, 74, 421, at 424, the public act “*ist für den Rechtskundigen ohne weiteres ersichtlich*.” See also *Bundesgerichtshof* [BGH] [Federal Court of Justice], Apr.15, 1994 V ZR 175/92, <https://perma.cc/4TDQ-GXL2> (the Supreme Court recognizes the full proof to a change handwritten by the notary over the typed text of the notarial act).

23. See K. Schreiber, *sub* § 415 ZPO, in MÜNCHENER KOMMENTAR ZUR ZIVILPROZESSORDNUNG 208 (4th ed. 2012).

24. BGH, Jun. 10, 2016, V ZR 295/14, <https://perma.cc/3CYM-X3QU>. On the same ground in a criminal case for falsity, the German Supreme Court decided that a notary is not guilty if a party of the act declares that he or she knows the German language, but this is not true: the content of the declaration is not covered by full proof. See BGH, May 25, 2001, StR 88/01.

declared the (wrong) surface, but that the actual surface could be proved by any kind of evidence.

A similar rule exists in the Netherlands' Code of Civil Procedure.²⁵ In France and Italy, the day-to-day evidentiary value of the public document reflects the history of the action for falsity of documents that took place during Napoleonic codification. In Roman *ius commune*, as explained by Dumoulin, the public document provides full proof of the facts contained within for whomever it represents: "*Quoad veritatem et probationem, plenam fidem facit quoad omnes; . . . acta vel quaecumque scripta publica probant se ipsa, id est rei taliter gestae fidem faciunt inter quoscumque.*"²⁶ Differing from proof, the effect of the negotiation, as contained in the public document, is relevant only to the parties, their heirs, and successors.²⁷ The Roman *ius commune* solution is still applied in Scotland, where the authentic document "is held to prove the verity of the legal actus expressed in it as the genuine actus of its author."²⁸ Pothier intended to follow traditional teachings. He wrote:

An original authentic act has in itself full credit as to what is contained in it The signature of the officer who has received the act, carries full credit of everything which the act contains, and of the signature of the parties who have subscribed it²⁹ Authentic acts are entitled to credit, principally against the persons who were parties to them, their heirs, and those deriving title under them. They have full credit against such persons as to all the operative part of the act, that is to say, of every thing which the parties had in

25. C.H. Van Rhee, *Evidence in Civil Procedure in the Netherlands: Tradition and Modernity*, in EVIDENCE IN CONTEMPORARY CIVIL PROCEDURE 270 *et seq.* (C.H. Van Rhee & A. Uzelac eds., Cambridge U. Press 2015); *see art. 156 et seq. Rv* (Netherlands' Code of Civil Procedure).

26. C. DUMOULIN, COMMENTAIRES SUR LA COUTUME DE PARIS nn. 8, 10 (1539; revised ed. 1665), *reprinted in* C.B.M. TOULLIER, 3 LE DROIT CIVIL FRANÇAIS 278 (1847).

27. *Id.*

28. *See also* D.M. WALKER, PRINCIPLES OF SCOTTISH PRIVATE LAW 94 (Oxford U. Press 1982); a similar formula to Dumoulin's can be read in A. MCDOWALL, 2 AN INSTITUTE OF THE LAWS OF SCOTLAND IN CIVIL RIGHTS 502 (1752): notarial acts "are probative by themselves, unless unproven."

29. POTHIER, OBLIGATIONS OR CONTRACTS, *supra* note 5, at 517; Pothier, *Traité des obligations*, *supra* note 5, at 368.

view, and which constitutes the object of the act³⁰ The act proves against a third person, *rem ipsam*, that is to say, that the transaction which it includes has intervened.³¹

In his explanation, Pothier links the evidence given by the public document, between the parties and their heirs and successors, to the content of it and not only to the historical facts documented by the act.³²

The French Notarial Law of 1803 stated that notarial acts shall have full credit in court (“*feront foi en justice*”).³³ The Napoleonic Code recognizes for the most part the teachings of Pothier and states: “An authentic act is absolute proof of the agreement it contains between the contracting parties and their heirs or assignees.”³⁴ The law, on one hand, seems to attribute probative value only between the parties and their heirs and successors, while on the other hand, it seems to extend such probative power to the negotiating power of that document.

The French model has been replicated in Louisiana, where article 2236 of the Louisiana Civil Code of 1870 states: “The authentic

30. POTHIER, OBLIGATIONS OR CONTRACTS, *supra* note 5, at 518; Pothier, *Traité des obligations*, *supra* note 5, at 369.

31. *Id.*

32. On this point, *see* the discussion of TOULLIER, *supra* note 26; *see also* the explanation that attempts to rationalize the work of Pothier by F. MOURLON, II RÉPÉTITIONS ÉCRITES SUR LE CODE CIVIL 862 (1885).

33. Law of March 16, 1803 (loi 25 ventôse an XI), art. 19 para. 1.

34. The origins of article 1319 of the *Code Napoléon* and the interpretation given by Pothier of Dumoulin’s text are explained by TOULLIER, *supra* note 26, at 277. The adoption of article 1321 of the *Code Napoléon* (“*Les contre-lettres ne peuvent avoir leur effet qu’entre les parties contractantes . . .*”) refers also to contracts stipulated under public acts, and excludes the effectiveness of the full proof of that act, with respect to the content of other declarations. After the French reform of contracts, article 1321 on counterletters has been replaced with article 1202 of the French Civil Code:

Est nulle toute contre-lettre ayant pour objet une augmentation du prix stipulé dans le traité de cession d’un office ministériel.

Est également nul tout contrat ayant pour but de dissimuler une partie du prix, lorsqu’elle porte sur une vente d’immeubles, une cession de fonds de commerce ou de clientèle, une cession d’un droit à un bail, ou le bénéfice d’une promesse de bail portant sur tout ou partie d’un immeuble et tout ou partie de la soulte d’un échange ou d’un partage comprenant des biens immeubles, un fonds de commerce ou une clientèle.

act is full proof of the agreement contained in it, against the contracting parties and their heirs or assigns, unless it be declared and proved to be a forgery.”³⁵ The same rule appeared in the 1866 Civil Code of Lower Canada.³⁶ In Italy, article 1317 of the Civil Code of 1865 upheld the French model, but distinguished between the *intrinsic* and *extrinsic*: the notarial act gives full proof of the facts that the notary declares have occurred in his presence.

IV. INTRINSIC AND EXTRINSIC: A GAZE ON THE DIFFUSION OF THE FRENCH AND ITALIAN SOLUTIONS ON THE “FULL PROOF ACT” DEBATE

French and Italian scholars have immediately corrected what is provided for under article 1319 of the Code Napoleon and article 1317 of the Italian Civil Code of 1865. The rule is thus—the public document is full proof of the date, identity of the public official, and signatories, as well as the actual occurrence of declarations and facts as attested in the act (the extrinsic), but not of the truth of the declarations issued by the parties or the judgments issued by the notary (the intrinsic).³⁷ This teaching is further addressed in article 2700 of the Italian Civil Code of 1942.

35. See the classical treatise of SAUL LITVINOFF, 6 OBLIGATIONS 202 (West 1969).

36. Article 1310 of the Civil Code of Lower Canada, 1866, mirroring that of the French Code states the following:

L'acte authentique fait preuve complète entre les parties, leurs héritiers et représentants légaux:

1. *De l'obligation qui y est exprimée;*

2. *De tout ce qui y est exprimé en termes énonciatifs, pourvu que l'énonciation ait un rapport direct à telle obligation ou à l'objet qu'avaient en vue les parties en passant l'acte . . .*

Also, article 1311 provides for an action against falsity in a notarial act, regulated by the Code of Civil Procedure, as per the French model. See H. KÉLADA, NOTIONS ET TECHNIQUES DE PREUVE CIVILE 35 *et seq.*, 53 (Wilson & Lafleur 1986); M. A. TANCELIN, DES OBLIGATIONS : CONTRAT ET RESPONSABILITÉ 120 *et seq.* (Wilson & Lafleur 1986).

37. In theory, for example, the mental health of the testator, ascertained by the notary and mentioned in the public will, is not considered covered by the full proof of the act and can be fought with simple evidence to the contrary: see TOULLIER, *supra* note 26; See also A. DURANTON, 7 COURS DE DROIT FRANÇAIS 273 (3d ed. 1834); LAROMBIÈRE, *supra* note 19, at 518; G. BAUDRY-LACANTINERIE & L. BARDE, III TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL :

The same rule is now adopted in the new Quebec Civil Code: “The recital, in an authentic act, of the facts which the public officer had the task of observing or recording makes proof against all persons.”³⁸ Thus, we find that the same rule has been applied both in German law and the French legal tradition.

French and Italian scholars thought that Pothier did not have clear ideas on this subject so they superimposed *intrinsic* and *extrinsic* notions on legislative texts. In reality, Pothier knew perfectly well what he was writing and French legislators intended to follow his teachings. Successive French authors placed a new significance upon simulation.

In the French *ius commune*, contracting parties (and thus their heirs and successors), were unable to oppose the evidentiary effect of a public document, even in regards to the content of the negotiations. Only matrimony was subject to the appeal of a counter declaration (*les contrelettres*) which, however, could not be enforced against third parties.

DES OBLIGATIONS 420 (2d ed. 1905); T. HUC, 3 COMMENTAIRE THÉORIQUE & PRATIQUE DU CODE CIVIL 281 (Pichon 1895); M. PLANIOL & G. RIPERT, VII TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 886 (2d ed 1954); For Belgium, *see* H. DE PAGE, III TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL BELGE: LES OBLIGATIONS (2d ed., E. Bruylant 1950), which refers to following code formula “*ne doit pas être prise à la lettre.*” In the case law, *see* C.A. Fort-de-France, Nov. 23, 2012, n. Rg 117 00072 and C.A. Paris, Oct. 18, 2011, 10/02929 (in these cases judges allowed any means to contest the content of the declaration made by the parties); *see also* C.A. Paris, Jun. 24, 2016, 14/19810 (in this case there was an error in the description of the immovable sold); For Italy, *see* E. PACIFICI-MAZZONI, I TRATTATO DELLA VENDITA 152 (3d ed.1901); G. GIORGI, I TEORIA DELLE OBBLIGAZIONI NEL DIRITTO MODERNO ITALIANO 378 (3d ed. 1890); and for case law, *see* Cass. Turin, Apr. 19, 1866, Giur. it., 1866, 187; Cass. Florence, Jan. 27, 1870, *Legge* 1870, I, 281; Cass. Rome, Nov. 22, 1876, *Legge* 1877, I, 59; Cass. Naples, Feb. 9, 1883, *Legge* 1883, I, 585; Cass. Palermo, Apr. 22, 1894, *Legge* 1894, II, 332. As it has already been seen, in Quebec only the French legal model was initially adopted. However, the doctrine was quickly brought into line with the French: KÉLADA, *supra* note 36, at 53, speaking of “*inexactitude de rédaction.*” and J.-C. ROYER, LA PREUVE CIVILE 101 (1987), admitting that “*nos codificateurs ont commis la même erreur rédactionnelle que ceux du Code Napoléon . . . La doctrine française et québécoise a corrigé cette erreur.*” Eventually, the new Civil Code adopted the rule approved by scholars.

38. Art. 2818, Civil Code of Quebec.

French legislators, following the teachings of Domat, extended this particular rule to any contract, but always under the law of evidence, and not as a rule on the effects of contracts.³⁹ This springs from the old article 1321 of the Code Napoleon: “Counterletters can have effect only between the contracting parties; they cannot have effect against third parties.” It is worth noting that the new articles 1200-1202 of the *Code civil français* (French Civil Code) enacted after the recent reform of contract law in 2016, maintain the same content. The rule thus allows a declaration that seeks to paralyze the preceding document and only affects the law of evidence. In practice, this means that the parties to a contract may invoke the second document with the aim of minimising the evidentiary effect of the first.

Scholars began to bring the problems of the *contrelettres* under the frame of natural law. This likens a contract to the pure will of the parties and consequently treats falsity as a divergence between will and declaration. Scholars no longer consider this question a problem of proof. Counter-declarations thus assume relevance as an indication of the difference between will and declaration at the moment of the creation of the false document.

In conclusion, current German, Italian, and Quebec legal rules, as well as French doctrinal rule, establish that the notarial act is conclusive evidence only of the occurrence of the described event (the extrinsic).⁴⁰ The same conclusion is reached in Scotland.⁴¹

39. See J. DOMAT, *LES LOIX CIVILES DANS LEUR ORDRE NATUREL* 213 (1777).

40. See G. CHIOVENDA, *PRINCIPII DI DIRITTO PROCESSUALE CIVILE: LE AZIONI IL PROCESSO DI COGNIZIONE* 845 (Jovene 1965). V. ANDRIOLI, *II COMMENTARIO AL CODICE DI PROCEDURA CIVILE, DEL PROCESSO DI COGNIZIONE* 154 (1956); O. JAUERING, *ZIVILPROZESSRECHT* 200 (21st ed. 1985); Ahrens, *supra* note 22; Berger, *supra* note 22.

41. See J. ERSKINE, *THE PRINCIPLES OF THE LAW OF SCOTLAND* 483 (1827): “Notarial instruments . . . bear full evidence that the solemnities therein set forth were used . . . do not prove any other extrinsic fact.” See also G. J. BELL, *PRINCIPLES OF THE LAW OF SCOTLAND* 826 (10th ed. 1899): “Notarial instruments . . . are good evidence of the act which it is the province of a notary to perform, but not of extraneous facts recited in the instrumentum;” 17 *THE LAWS OF SCOTLAND* 477 *et seq.* (1989).

V. DOCUMENTARY EVIDENCE IN COMMON LAW ORAL PROCEEDINGS: SOME ENLIGHTENING CASES

Contrary to the alleged prevalence of written proof in the civil procedure of Romano-Germanic systems, it is commonly said that English law developed a procedural system that places a greater emphasis on oral evidence. Indeed, witnesses are considered “the principle items of judicial evidence,”⁴² while documentary evidence is relegated to second place, in one of the last chapters of the law books, as a subject of the lowest importance.

An explanation is required. Documents are obviously allowed in court. If a private document is produced, including in the form of a deed, it does not provide conclusive proof of the date, origin, and content unless supported by testimonial evidence.⁴³

42. See C. TAPPER, CROSS & TAPPER ON EVIDENCE 37 (12th ed., Oxford U. Press 2010); Walter H. Rechberger, *The Principles of Oral and Written Presentation*, in DIMENSIONS OF EVIDENCE IN EUROPEAN CIVIL PROCEDURE, *supra* note 4, at 71 (underlining that the evidentiary effect of any document is linked to the legal provisions that requires the oral or the written form of proceedings). For many years, after the Norman conquest, written proof and in particular, the deed, prevailed in court over oral testimony; for historical reconstruction and references taken from Bracton, Glanville, and the Year Books, see J. Salmond, *The Superiority of Written Evidence*, 6 LAW Q. REV. 75, 81 (1890). It must however be observed that the prevalence of written documents reduced with the gradual transformation of the jury: a group of individuals informed of the facts of the case that become a collegiate judge and who, as a group, are informed of the evidence through the process. Such evidence is primarily presented orally.

The close connection between the structure of the common law process, which on the one hand sees juries and non-bureaucratic judges come together, and oral characteristics on the other, bringing with it a concentration of the case in one public moment and a refusal of written evidence, to be produced along a prolonged evidentiary phase, is underlined by DAMASKA, *supra* note 20, which highlights that in common law systems the pre-trial phase is assuming increasing importance and in some places of the United States, it is possible to waive the hearing of the case. See also D. Bolzanas & E. Tamošiūnienė, *Witness Testimony*, in DIMENSIONS OF EVIDENCE IN EUROPEAN CIVIL PROCEDURE, *supra* note 4 at 161.

43. TAPPER, *supra* note 42, at 610. Only after the witness to the document provides testimony that the document is proof, the concerned party is considered to have provided prima facie evidence, that is, “to mean prima facie proof of an issue, the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges his onus.” See *Ex parte The Minister of Justice: In re Rex v. Jacobson & Levy* [1931] AD 466 at 478.

Thus, witnesses to a document's signing must acknowledge the signing of the document in question.⁴⁴ The unfit nature of a document to provide standalone evidence in court without a compliant witness also applied to documents authenticated by public notaries. Notarial authentication on documents "renders them evidence in foreign courts, though certainly not in our Courts of Common Law."⁴⁵ This rule is extremely old. In 1603, it had already been decided that a witness was required for the signing, sealing, and delivery of a deed. It was insufficient to provide a copy of the document, even if drafted by a notary.⁴⁶

More recently, that precedent was restated in *Chesmer v. Noyes* in 1815⁴⁷: a notarial protest against a foreign check, made by a notary from Bristol, was produced in court. Lord Ellenborough decided that proof of a missing payment had not been provided as "the presentment of a foreign bill in England must be proved in the same manner as if it were an inland bill," thus calling the notary as a witness.

In 1870, the Privy Council in *Nye v. Macdonald*⁴⁸ decided on a distinct matter: the plaintiff was based in Lower Canada (presently Quebec) a civil law jurisdiction. To claim land he produced evidence of his right which, among other things, included a power of

44. The importance of testimonial proof is thus understood; relative to a deed, the recent Law of Property Act 1989 holds this importance at its foundations, as it required the presence of witnesses at the drafting phase. On this subject, see M. CAPPELLETTI, PROCÉDURE ORALE ET PROCÉDURE ÉCRITE 18 (Giuffré 1971). Cappeletti observes that the preference for oral proof in English law finds justification not only in history: this preference is founded also on the essential principles of the process, which require the author of the documents to appear in court to testify and be cross-examined by the litigants, and on the acceptance of the hearsay rule, which leads to the inadmissibility of a document, which in itself expresses the thoughts and beliefs of its author, absent from the trial.

45. As stated by Lord Tenterden in *King v. Scriveners' Co*, *supra* note 10.

46. See SIR G. CARY, REPORTS OR CAUSES OF CHANCERY 44 (William Lambert ed., Sweet 1820) and 21 E.R. 17, which reports the decision of the court: "therefore non allowance to be given of a deed, without producing the deed, or proving the execution thereof; and here appeareth what want we have of notaries and their deputies."

47. *Chesmer v. Noyes* (1815) 4 Camp. 129; 171 E.R. 42.

48. *Nye v. Macdonald* (1870) 7 Moo. N.S. 134; 17 E.R. 52.

attorney, received in the presence of a witness by a notary public of Upper Canada (presently Ontario), a common law jurisdiction. Here the question of identity was raised, even if ascertained by a notary. The plaintiff presented a declaration issued by the government of Upper Canada, certifying the appointment and powers of the notary and affirming that the notarial act was considered proof of the identity of those who signed the act. The Canadian court of second instance did not consider the notarial act to be proof. The Privy Council approved the decision, stating that the notary public of Upper Canada could not be equated with a French notary; that the court, even if in territory governed by French law, could not attribute the same probative effect to an act of a notary public as is granted to public French acts; and that the application of the English rule was correct, requiring the testimony of the notary.⁴⁹ Therefore, “according to the law of England, the mere production of a certificate of a notary public stating that a deed had been executed before him would not in any way dispense with the proper evidence of the execution of the deed.”

The rule described above is subject to an exception: where it is not possible to call the notary to witness in court. This applies to two situations. The first situation relates to acts by notaries who have died before the case. A leading case is *Sutton v. Gregory* from 1797,⁵⁰ wherein a check issued in Boston was presented for payment in London, on the request of an endorsee of the check. The check was rejected (with notification of the rejection). The clerk died before the case. The rejection was produced in court and was proved by witness that a clerk of the notary, with the mandate to follow the

49. *Id.* at 58; the Privy Council did not apply the *lex fori* (the civil law of Lower Canada) to the issue of evidence, but rather, the English law in force in the place of the pre-establishment of the proof: “A Notary public in the province of Upper Canada, a province regulated by English Law, has no power, by English law, to certify to the execution of a deed in such a way as to make his certificate evidence, without more, that the deed was executed”

50. *Sutton v. Gregory* (1797) Peake Add. Cas. 150; 170 E.R. 226.

case, presented the check and recorded the act in the protest register. The proof was allowed because the clerk in question was deceased.

This rule was approved in *Poole v. Dicas* in 1835.⁵¹ A notary received a check; he sent one of his clerks to the debtor and the clerk took note of the protest in the appropriate register. The employee died during the case. The protest register and the signature of the register by the clerk were produced as proof. The Court held that this counted as sufficient proof, deciding that in the case of the death of the author of said signature, the production of the notarial act constitutes sufficient proof.

The second situation relates to notarial acts created overseas. In the 1802 *Hutcheon v. Mannington*,⁵² the court discussed an act received from a notary public of the Prince of Wales Island in the East Indies, held by the Indies Company. Again, a foreign bill protest from a foreign notary was held to provide full proof, as was held by Lord Ellenborough in *Chesmer v. Noyes*.⁵³

It is interesting to note that this second situation is justified in the English system by an international public law rule. English courts give a foreign document the same evidentiary proof attributed to it in the law of the place where it was formed. The court does not apply the rule given by the *lex fori*: “a Notary Public by the Law of Nations has credit everywhere: the Court therefore will give credit to him.”⁵⁴ The idea, according to which the common law judge must recognize the same evidentiary effect that is in place in the legal system where it was drafted, is very old in English law. Written in *Law French*, the 1624 report at the end of *Hurd v. Foy* clearly stated

51. *Poole v. Dicas* (1835) 1 Bing N.C. 649; 131 E.R. 1267. A similar precedent, concerning an act involving a deceased lawyer, may be found in *Doe d. Patteshall v. Turford* (1832), 3 B. & Ad. 890; 110 E.R. 327.

52. *Hutcheon v. Mannington* (1802) 6 Ves. Jun. 823; 31 E.R. 1327.

53. *Chesmer v. Noyes* (1815) 4 Camp. 129; 171 E.R. 42: “the protest may be sufficient to prove a presentment which took place in a foreign country.”

54. *Hutcheon v. Mannington* (1802) 6 Ves. Jun. 823; 31 E.R. 1327.

the following: “*sur trial de chose beyond sea, le testimony d’un public notary la est bon proof & Ley Chief Justice dit; que tiel proof que ils beyond sea voilont allow nous allowomus.*”⁵⁵

Returning to general documentary proof, there are two circumstances in which the document on its own is sufficient proof. In the first circumstance, official documents, issued by the public administration (not by a common law notary), are considered. The acquisition of a conforming copy of a document, drafted by a public authority, is sufficient proof of the date, the origin, and the content of the document. The public document provides *prima facie evidence* for the decision of the case, which can be overcome with evidence to the contrary.⁵⁶

Additionally, private agreements, even twenty years after drafting,⁵⁷ are preserved by various simple assumptions as long as they have been conserved correctly. Testimonial evidence could become impossible for the corroboration of the writing. Consequently, in the leading case of *Wynne v. Tyrwhitt*,⁵⁸ it was stated that the documents “coming from the proper custody are admissible in evidence, without proving the hand-writing” of their authors. Therefore, it is presumed that the date of the document is as stated, that the alterations to a deed *inter vivos* have been made prior to formalisation, and that the deed has been sealed in a valid mode (since 1989).

Finally, today English judges can receive a notarial act “in evidence without further proof.”⁵⁹ This rule can be rightly considered an example of the impact of European continental solutions of civil

55. *Hurd v. Foy* (1624) 2 Rolle 346; E.R. 843.

56. See TAPPER, *supra* note 42, at 607; this reminds us that the various fragmented legislative provisions of acts of the public administration, combined with the Evidence Act of 1845, s. 1 and the Evidence Act of 1851, s. 14, propose the presumption that a copy of an act of the public administration conforms with the original, on the basis of a declaration of the authority in question.

57. The twenty-year term is a result of the Evidence Act of 1938, s. 4; the common law precedent imposed thirty years. See TAPPER, *supra* note 42, at 614.

58. *Wynne v. Tyrwhitt* (1821) 4 B. & Ald. 376; 106 E.R. 975.

59. CPR 2005, 32.20.

procedural law.⁶⁰ These last two rules are very important because they weaken the conflict between common law and civil law models on the evidentiary effect of written acts.

IV. COMPARING TWO MODELS ON CHALLENGING THE WRITTEN EVIDENCE

In all of the legal systems examined, when a solemn document is produced in court—public document, deed, or notarial act—the evidentiary effect of such a document can be challenged.

Two models can be identified to this end. The first model returns to the discussion of the evidentiary effect of a solemn document during the evidentiary phase of court proceedings. The affected party can thus demonstrate the falsity of the alleged document, both when involuntarily and voluntarily caused by the author. The classical example is when the notary describes in his act a fact that did not happen, or declares a date or a place different from the true date or place.⁶¹ The evidentiary effect of the document and the contrary elements thus contribute to judicial discretion.

This model is welcomed in English law, in which every evidentiary element is presented in court, including those documents, which aim to challenge the documents produced by the other party.⁶²

60. In general, on the Europeanization of English procedural law, *see* Sladic & Uzelac, *supra* note 20, at 110.

61. This research does not consider the different case of forgery, when a document is materially created as a false document.

62. Numerous sentences deal with the problem of falsity of written evidence and acts under seal, that have been verified by witness testimony, especially in criminal proceedings; *see* *The King v. Sponsorby* (1784) 1 Leach 333, 168 E.R. 269; *Leach v. Buchanan* (1802) 4 Esp. 226, 170 E.R. 700; *Rex v. Backler* (1831) 5 Car & P. 118; 172 E.R. 902; *Rex v. King* (1832) 5 Car & P. 123; 172 E.R. 905; *Rex v. Hurley* (1843) 2; M & Rob. 473; 174 E.R. 179 (in all cases, it is affirmed that the falsification of a signature on a cheque can be proven by witness and presumptions); *Boursot v. Savage* [1866] L.R. 2 Eq. 134 (falsity of a deed for the concession of a leasehold); *Cooper v. Vesey* [1881] L.R. 20 C.A. 611 (falsity of deed containing a warranty on property); *Barton v. North Staffordshire Rail. Company* [1888] L.R. 38 Ch. 458 (falsity of a document pertaining to the transfer of shares). *In re De Leeuw* [1922] L.R. 2 ch. 540 (falsity of a deed for the concession of a warranty on a property, proven with witnesses); *Fung Kai Sun v. Chan Fui Hing* [1951] L.R. A.C. 489 (similar to the previous case).

The recently enacted rule on the evidence of the notarial acts follows this solution: “A notarial act or instrument may be received in evidence without further proof . . . unless the contrary is proved.”⁶³

This model can also be found in § 415 Abs. 2 ZPO, which allows evidence to the contrary to contest a notarial act in courts: “Evidence proving that the transaction has been improperly recorded is admissible.” In Germany, as stated in § 445 ZPO, evidence to the contrary can be reached through the usual methods of proof, with the sole exception of interrogation of the parties.⁶⁴

Likewise, in Scottish law, it is possible to demonstrate the falsity of an authentic document according to the usual rules.⁶⁵ It must be emphasised that this model is perfectly compatible with the stated privileged evidentiary effect recognised to notarial acts. In Germany, § 415 ZPO provides the public act with the power of full proof, relative to the provision of documental facts by its author (extrinsic). However, a specific court procedure has not been imposed

63. CPR 2005, 32.20.

64. Berger, *supra* note 22, at 780 *et seq.*; Ahrens, *supra* note 22, at 649 *et seq.*; Schreiber, *supra* note 23, at 208. For relevant cases, see RG, Dec. 12, 1912, in RGZ, 81, 95 *et seq.* (a public will, endowed with evidentiary effect, as per §415 ZPO, was drafted on 27 September 1909. The will erroneously bore the incorrect date of September 25, 1909, but from other elements of the document and from the inspection of the repertoire of the attesting notary, it was possible to deduce the correct date, which was subsequently accepted by the courts. See also RGZ, Dec. 16, 1910, *supra* note 22, for a similar difference between the dates displayed a public will (Mar. 24, 1904) and the actual date (Mar. 24, 1905); RG, Jun. 7, 1905 in RGZ, 61, 95, in which it was proved by witness that a *Auflassung* (the document for the transfer of real property, to be carried out in front of a notary or at the court of the land registers, as per § 925 BGB) was drafted and read to the parties by an aide to the competent officer of the land registers office, who assisted with the relative operations and signed the document (the court confirmed the validity of the document); RG Feb. 5, 1931 in RGZ, 131, 284 *et seq.*, which allows for the proving of an error in the date of the annotation of the land register, witnessed by the force of full proof under §418 ZPO, and determined as sufficient proof the testimony of an employee of the office of land registers.

65. See WALKER, *supra* note 28, at 94, which places a rather heavy burden on the provision of evidence to the contrary drawn from a “probative document”: on the proof of forgery, see J. DALRYMPLE, VISCOUNT STAIR, THE INSTITUTIONS OF THE LAW OF SCOTLAND 990 (2d ed. 1693); McDouall, *supra* note 28, at 94; Erskine, *supra* note 41.

for disputing its precision. It is like this that Scottish authentic documents constitute full proof, save for demonstrations of falsity, without particular procedural burden.

The second model provides for the separation of the case in which the document is produced and a special procedure to contest the accuracy of the document. This model is utilised in France, Quebec, Belgium, and Italy, where the alleged falsity is received and the evidence derived from the public document maintains the nature of legal proof unless the false nature of the document is proved by special procedure.

The difference between the two models is found first in the structure of the civil process. In this example, an independent procedure is established to deal with the issue of falsity. Alongside this first characteristic there is a deeper difference, relative to the quality of the contrary evidence, requested to challenge the evidentiary effect of a public document. The establishment of a special procedure does not actually say anything about the difficulty in providing evidence to the contrary. The examination of the French model must thus take into account both the structure of the false incidental procedures and the type of proof that is requested.

VII. THE ACTION FOR FALSITY OF A NOTARIAL ACT

From the d'Aguesseau Grand Ordinance of 1737 and onwards, the French procedure to challenge the evidentiary effect of notarial acts has maintained its fundamental characteristics.

The action for falsity is a standalone declaratory action which initiates an autonomous process with the aim of ascertaining the true nature (real or false) of the declarations issued by the notary and, if falsity is found, to eliminate the contested document, indirectly excluding it as proof in the case. The action can be presented in both criminal and civil proceedings.⁶⁶

66. The French rule on the action for falsity in contemporary civil procedure is clearly illustrated by G. COUCHEZ & X. LAGARDE, *PROCÉDURE CIVILE* 357 (17th ed., Sirey 2014). For the application in the rule for the Belgian law, *see* M.

Originally, the procedure established with the action could require the judge to give at least three different decisions, unless there were other incidents in the proceedings to which the judge objected. The timeframe was divided into several stages. In the first stage, the plaintiff proposed the lawsuit and the court decided whether to admit or reject it.⁶⁷ The second the lawsuit was accepted, the process began in the court to verify the disputed document and later in the hearing, to decide upon the admission of the evidence. Finally, in the third stage, the evidence was considered and a judgement handed down on its basis.⁶⁸

The Italian Code of Civil Procedure and the French *Nouveau Code de Procédure Civile* have in part simplified the procedure for an action for falsity, streamlining the various steps. The intent is that the action leads to a typical evidentiary proceeding. The only difference between it and the normal examination of evidence is that the judge performs no specific formalities or conditions.

This model, requiring an autonomous procedure to challenge the evidentiary effect of the document, obviously presents the problem of the relationship between the procedure on falsity and the principal case. The civil procedure rules can leave the two actions (the one based on the notarial act and the other claiming its falsity) proceed independently or suspend the principal case (the one based on the

BOURGEOIS ET AL., *LA PREUVE ET LE FAUX* 60 (Anthemis 2017); *See also* for general remarks J. Beardsley, *Proof of Fact in French Civil Procedure*, 34 AM. J. COMP. LAW 459 (1986).

67. In this particularly solemn introductory phase, the plaintiff must determine if the other party is requesting to use the challenged document; the requesting party, in person or with power of attorney, must respond, and if they intend to use the document, the plaintiff must declare to cancel the proposal for the action; the defendant must then present the document; the sentence that accepts the action nominates the presiding judge.

68. On legal suits that are underway, *see* POTHIER, *OBLIGATIONS OR CONTRACTS*, *supra* note 5, at 372; and for French Law, which follows the pre-coded phase as illustrated by Pothier, *see* E. Garsonnet, *Trattato teorico e pratico di procedura civile*, 2 GIUR. IT. 760 (1912); at the time, the Italian Code of Civil Procedure of 1865 was tending towards the French model. *See* the extensive comments of L. BORSARI, 4 IL CODICE ITALIANO DI PROCEDURA CIVILE 5 *et seq.* (2d ed. 1888); F.-S. GARGIULO, 2 IL CODICE DI PROCEDURA CIVILE DEL REGNO D'ITALIA 381 *et seq.* (2d ed., Marghieri 1887).

notarial act) until a judgment is given on the falsity of the document itself.

In the past, the solution to the problem was understood to be the prioritisation of the full faith in the notarial act. The original text of article 13 of French Notarial Law repeated the rules of *ius commune*, as accepted by Pothier, which acknowledged the full effect of the act until a judgment definitively declares the falsity of the document: “*les actes des notaires publics seront exécutoires dans tout le royaume, nonobstant l’inscription de faux, jusqu’à jugement définitif.*”⁶⁹

Later, article 1319 of the Code Napoleon stated that the judge could suspend the enforcement of the act during the procedure on falsity.⁷⁰ After the recent reform of contract law in France, the new article 1371 of the Civil Code provides that in case of falsity action, the court may suspend the performance of the act: “*En cas d’inscription de faux, le juge peut suspendre l’exécution de l’acte.*”⁷¹ The same solution appears in article 1317(2) of the Italian Civil Code. Incidentally, the falsity action in Italy and France after the 1975 re-

69. See Pothier, *Traité des obligations*, *supra* note 5, at 368; to protect the creditor who is relying on a public document, he shares the solution that “*jusqu’à ce que l’accusation de faux ait été jugés tels, ils font foi par provision; et le Juge doit ordonner l’exécution provisoire de ce qu’ils renferment.*”

70. On the effect of the public document during the process of the action for forgery, see TOULLIER, *supra* note 26, at 248; DURANTON, *supra* note 37, at 274; BAUDRY-LACANTINERIE & BARDE, *supra* note 37, at 433; DE PAGE, *supra* note 37, at 754.

71. See Report to the President of the Republic relating to the Feb.10, 2016 ordinance n° 2016-131 on the reform of contract law, general regime, and proof of obligations, Subsection 2: The Authentic Instrument, <https://perma.cc/GYG6-UYAL>:

L’article 1371 reformule en le clarifiant l’actuel article 1319 : les énonciations relatives à des faits que l’officier public a constatés par lui-même et dont il a pu vérifier l’exactitude, font foi jusqu’à inscription de faux. A contrario, celles relatives à des faits qu’il n’a pas constatés par lui-même, et non évoquées par le texte, ne font par conséquent foi que jusqu’à preuve contraire. L’alinéa 2 propose un texte adapté aux évolutions de la procédure d’inscription de faux (qui lorsqu’elle est engagée à titre principal, n’exige plus une saisine préalable du juge pénal) et laisse le juge apprécier l’opportunité de suspendre l’exécution de l’acte authentique.

form gave life to a procedure that suspends the treatment of the principle case, as the document in question is considered indispensable, but consents to the referral to the judge for the combined decision on the falsity and the principle case. The complete division of the two models illustrated is thus not absolute.

Indeed, French and Italian judges have always been able to determine the falsity of a notarial act, avoiding to open a case on it where the falsity is detected *ictu oculi*. In France this solution was already adopted by the *Cour de Cassation* before the codes were enacted.⁷² Following this, the rule was written in article 214 of the old French Code of Civil Procedure, in force from 1807 to 2007, which allowed the judge to adopt the action “*s’il y échet*,” allowing the judge to exert discretion in the allowance or rejection of a document as false.⁷³ Similar rule is now given by article 307 of the new Code of Civil Procedure.

Additionally, it is understood that the judge has the power to eliminate the difference between two conflicting documents, both constituting legal proof, when the falsity of one of them is readily ascertainable. The same model also applies in Quebec.⁷⁴

VIII. THE BURDEN OF PROOF IN CASES OF FALSITY

French and Italian scholars underline the extreme difficulty in bringing forth an action for falsity. For example, De Page, from Belgium, identifies the action for falsity: “*est la seule preuve contraire*

72. See for example Cass., 14 floréal an X, S. Jur., 1802.1.603.

73. The solution was adopted in Cass., Aug. 18, 1813, S. Jur., IV.1.432 and followed, among others, by Cass., Jan. 12, 1833, S. Jur., 18734.1.798; Cass., Mar. 25, 1835, S. Jur., 1835.1.510; Cass., Aug. 23, 1836, S. Jur., 36.1.740; See also Garsonnet, *supra* note 68, at 758; DURANTON, *supra* note 37, at 279; LAROMBIÈRE, *supra* note 19, at 279; BAUDRY-LACANTINERIE & BARDE, *supra* note 37, at 430; DE PAGE, *supra* note 37, at 753. The solution is also adopted in article 308 of the French Civil Code of Procedure, which states the following: “*Il appartient au juge d’admettre ou rejeter l’acte litigieux au vu des éléments dont il dispose.*”

74. Arts. 258-260, Quebec Code of Civil Procedure.

admise contre les mentions protégés par l'authenticité."⁷⁵ Thus, it could be assumed that the necessary proof for demonstrating the falsity of a notarial act is particularly rigorous, and that the law precisely determines the means of evidence that are admissible. Various legislative provisions appear to be very strict: the plaintiff, when depositing the complaint to the courts, must specifically indicate "the motives" for the action and the clear proofs of the falsity.⁷⁶

In reality, the much-proclaimed difficulty vanishes quickly, as the contestation of the truthfulness of the notarial act can be sustained with the usual methods of proof, also in systems that allow for the action for falsity.⁷⁷ Thus, in each of the legal systems analysed, the obligation to overcome the evidentiary effect of a notarial act is substantially identical. Reading the relevant decisions confirms this.

Single pieces of evidence should thus be considered. The inspection of the document in question is obviously the first piece of evidence that should be referred to. It is, as already shown, sufficient in cases where the falsity is discovered by a judge *ictu oculi*.⁷⁸

Testimonial evidence, in systems where the complaint of forgery exists, is easily permitted, without limit on the value, debating over

75. DE PAGE, *supra* note 37, at 753; BAUDRY-LACANTINERIE & BARDE, *supra* note 37, at 430 (advising the reader of how complicated and dangerous a complaint is).

76. See art. 306 para. 2, French Civil Code of Procedure. For the Italian rule, see Cass., pen., sez. I, Feb. 6, 2017, n. 5494.

77. As per G. De Stefano, *Falso (incidente di)*, in XVI ENCICLOPEDIA DEL DIRITTO (1967) and C.A. Catania, Jun. 22, 1957, Rep. Foro it., 1958, Falso Civile, n. 3. This solution is prevalent in systems based on the French model: for France and Belgium, see DE PAGE, *supra* note 37, at 745; for Québec, see ROYER, *supra* note 37; KÉLADA, *supra* note 36, at 55; Houle c. Lussier (1976) C.S. 7, which allowed for the witness.

78. It is also doubtful whether it is necessary to bring forth an action for falsity, in the event of a discrepancy in the relative documentation, when the issue is a simple material writing error: in Italy, see Cass., Jan. 30, 1968, n. 294, Rep. Foro it. Falso civile, n. 11; Cass., Nov. 25, 1982, n. 6375, Rep. Foro it., Falso civile, n. 4. More recently, see Cass. Civ., sez. II, May 28, 2007, n. 12399.

the verification of the facts.⁷⁹ Thus, the almost indisputable evidentiary effect of the notarial act begins to crumble. A problem which has long worried older French and Italian scholars, for which a positive solution has been found, concerns the admissibility of the evidence of so-called instrumental witnesses, who were present in the drafting of the notarial act.⁸⁰ The notary himself may be heard as witness in the falsity claim.⁸¹

Technical expertise constitutes another important proof in the action for falsity.⁸² Documents of comparison can also be considered documents not recognised by the parties, notwithstanding the limits set for the process of verification of private documents.⁸³

Presumptions are likewise held to be valid methods of proof, which can be offered by the plaintiff in the action for falsity.⁸⁴

79. POTHIER, OBLIGATIONS OR CONTRACTS, *supra* note 5, at 378: “*on fait entendre tous les témoins qui peuvent avoir connaissance de la fabrication, altération, et en général, de toute la fausseté des pièces accusées de faux, ou des faits qui peuvent servir à en établir la preuve.*” See also Garsonnet, *supra* note 68, at 774; BAUDRY-LACANTINERIE & BARDE, *supra* note 37, at 431; LAROMBIÈRE, *supra* note 19. For Italy, see GARGIULO, *supra* note 68, at 381 *et seq.*; M. ZANZUCCHI, 2 DIRITTO PROCESSUALE CIVILE, DEL PROCESSO DI COGNIZIONE 88 (5th ed., Giuffrè 1962). For cases, see Cass. Turin, Apr. 6, 1872, Giur. it., 1872, 277 (Public will: witnesses were called upon to testify that the testator was unable to express himself and had not made his intentions clear to the notary. The Court overturned the decision of the appeal, which refused this evidence); and Cass. Turin, Feb. 13, 1883, Giur. it., 1883, 353, 356 (forged holographic will based on expertise and presumptions).

80. The positive solution was found in the French Cass., Mar. 12, 1838, S. Jur. 1838.1.296; it can also be found in Garsonnet, *supra* note 68, at 774 note 4; BORSARI, *supra* note 68, at 412 *et seq.*; GARGIULO, *supra* note 68, at 429.

81. Garsonnet, *supra* note 68, at 774 note 4; Cass. Turin, Apr. 10, 1885, Giur. it., 1885, 396.

82. POTHIER, OBLIGATIONS OR CONTRACTS, *supra* note 5, at 378; Garsonnet, *supra* note 68, at 774; BAUDRY-LACANTINERIE & BARDE, *supra* note 37, at 431; LAROMBIÈRE, *supra* note 19; GARGIULO, *supra* note 68, at 433 *et seq.*; BORSARI, *supra* note 68, at 414 *et seq.*; COUCHEZ & LAGARDE, *supra* note 66, at 358. However, the French *Cour de cassation* recently decided that the technical expertise cannot be used outside the special procedure for falsity. See Cass., Jun. 11, 2003, D. 2003, 1808. Therefore, the judge cannot, during the trial, accept the expertise and set aside the notarial act, and the parties must initiate the procedure for falsity.

83. See C.A. Milan, Dec. 21, 1965, Foro Pad., 1966, I. 922 *et seq.*; C.A. Florence, Jul. 29, 1957, Giur. Tosc., 1957, 479; Cass., Jun. 7, 1977, n. 2333, Rep. Foro it., 1977, Falso Civile, n. 5.

84. See LAROMBIÈRE, *supra* note 19, at 534; BAUDRY-LACANTINERIE & BARDE, *supra* note 37, at 432; For Italy, see De Stefano, *supra* note 77, at 713; F.

It is thus clear that the favourable aspect of the evidentiary effect bestowed upon a notarial act almost disappears in reality with the use of contrary presumptions. The only remarkable feature of this model is found in the autonomy of the proceedings for falsity.

IX. CONCLUSIONS

The notarial act has its origins in France and is strictly connected to the evidentiary requirements established by the Roman-Canonical civil procedure introduced with the reforms of Louis IX. Notaries were established in 1254 for creating written proof (*i.e.*, the notarial act) for contracting parties. At the early stages of the French civil procedure, their function was to offer a qualified witness to the judge on the information (promises, facts, transfer of rights) that was held in the notarial act. Following this, as the civil procedure developed, the production of a notarial document became sufficient.

This original important feature still appears in Germany. For example, § 437 Abs. 2, ZPO provides that “[s]hould the court have doubts as to the authenticity of a record or document, it may also demand ex officio that the public authority or the person alleged to have executed the record or document make a statement regarding its authenticity.” Whenever there is doubt surrounding the evidentiary effect relative to the so-called extrinsic nature of a public document, the judge may allow the notary to testify.⁸⁵

As mentioned in the previous pages, historical evolution suggests that the public document and the Latin notary represent two parts of a strong legal institution. In reality, however, the apparent stability of the notary profession hides a serious decline: the first

Carnelutti, *Prove del falso documentale di provenienza*, 2 RIV. DIR. PROC. CIV. 47 (1936).

85. See Berger, *supra* note 22, at 843 *et seq.*, which emphasises that the notary may be heard by the judge; Ahrens, *supra* note 22, at 756 *et seq.*

centuries of notarial practice contributed to the creation of institutions and contractual forms that were destined for greatness.⁸⁶ Following this, notarial activities were concentrated on the drafting of wills and property contracts. That said, since real estate wealth has lost the central and dominant role in favour of movables and financial instruments, the notary has remained largely detached from the most innovative areas of the law.

In this evolutionary process, the usefulness of the notarial act can be seen initially at the procedural level. The presentation in court of a notarial act avoids time wasting and the risk of an unfavorable outcome, which can originate from the disregard of a private document.⁸⁷

Thus, the differences between the two models can be reconstructed and verified. The first model, mainly adopted in common law systems, is characterised by oral evidence, to which the notions of the absence of legal proof and a subject are correlated, charged with the production of procedurally privileged documents. In these systems the notarial function is adopted normally to produce documents, destined for use in other systems.

86. See M. WEBER, *ECONOMY AND SOCIETY* (UC Press 1978). Such is the thesis of Max Weber in "Economy and Society," which merits mention:

the notaries were the only remaining group in Italy by whom the traditions of a developed commercial law could be perpetuated and transformed. They were, for a long time, the specific and dominant class of legal experts . . . the notaries were one of the most decisive strata in the development of the law in general, and until the emergence of the class of legally trained judges in Italy . . . Their own traditions, their long-lasting connection with the imperial courts, the necessity of quickly having on hand a rational law to meet the needs of the rapidly growing requirements of trade, and the social power of the great universities caused the Italian notaries to receive Roman law as the very law of commerce, especially since, in contrast to England, no corporate or fee interests were standing in the way.

The Weberian position is confirmed by M. RHEINSTEIN, *EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG* 171 (2d ed., Tübingen 1987). Among the innovations brought forth through notarial practice exists the notable clause of *saisine-dissaisine* inserted in sales, of particular importance in French common law: see H. COING, 1 *EUROPÄISCHES PRIVATRECHT: ÄLTERES GEMEINES RECHT* (1500 BIS 1800) 451 (Beck 1985).

87. The structural connection between the written procedure, legal proof, public document and notary is hinted at in CAPPELLETTI, *supra* note 44, at 18-19.

The second model, found in systems that have received the written Roman-Canonical procedure, is characterised by the existence of documents equipped with evidentiary effect. A person qualified to do so prepares this type of document: for historical reasons, normally this is a Latin notary, but it could also be considered the task of a public notary, such as in Baden Württemberg, or a lawyer acting as notary, as in other German law countries and in Scotland.

Through this brief comparative analysis, it is now clear that the distinction between the common law and civil law is increasingly disappearing on the significance of notarial acts. The evidentiary value of notarial acts is an interesting case for the convergence of these legal systems.⁸⁸

If it is true that, on one side, the attributed evidentiary effect in English law is bestowed upon the writings held in proper custody; on the other side, in Latin systems, it is possible to contest the evidentiary effect of the notarial document by any means, including an action for falsity (when deemed necessary). These two methods lead to a marked weakening concerning the difference between the two models.

Many civil procedure scholars think that future evolution will show an increasing orality in the proceedings in European continental systems. Therefore, a decrease in the evidentiary strength of the notarial act and a progressive disappearance of the traditional opposition of the evidentiary rules between civil law and common law systems is conceivable.

88. See T. Keresteš & J. Caramelo Gomes, *Common Core After All?*, in DIMENSIONS OF EVIDENCE IN EUROPEAN CIVIL PROCEDURE, *supra* note 4, at 324.